

April 20, 2011

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20534

**Re: *In the Matter of inContact, Inc. Form 499 Filer ID No. 818114
Petition for Special Relief and Waiver and Application for Review,
WC Docket No. 06-122***

Secretary Dortch:

This letter provides Notice of ex parte presentations made on behalf of inContact, Inc. ("inContact") on March 22nd and April 15, 2011. This filing is made at this time because, while it was concluded that these presentations do not qualify as "ex parte presentations" under Section 1.1202(b), the spirit of full disclosure is better served by submitting this Notice for the record.

On March 22, 2011, Charles H. Helein, senior partner, Helein & Marashlian, LLC, met with Commissioner Robert M. McDowell regarding inContact's pending Application for Review of the Wireline Competition Bureau's ("WCB") May 7, 2010 Order ("Application") in the above-captioned proceeding, DA 10-779. During the meeting, Mr. Helein provided Commissioner McDowell with the attached hand-outs (titled "Memorandum: Briefing outline to prepare for ex parte meeting to discuss inContact's pending request for relief from USAC's 2009 true-up adjustment related to 2003 revenues" and "Memorandum: inContact, Inc. Application for Review of Order of Wireline Competition Bureau Order, DA 10-779, dated May 7, 2010") discussing the Application and inContact's underlying Petition for Special Relief and Waiver ("Petition"), which the WCB denied based upon procedural grounds in the May 7th Order. Further, Mr. Helein sought recommendations on how to obtain Commission action on the Application. The merits of the Application or of the related filings were not discussed.

On April 4, 2011, Mr. Helein contacted the Office of General Counsel ("OGC"), and forwarded the attached memorandum titled "Order of the Telecommunications Access Policy Division Wireline Competition Bureau *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*" to Ms. Diane Holland Griffin. On April 15, 2011, Mr. Helein and the undersigned, met with OGC staff, Ms. Griffin and Ms. Julie Veach, and with Mr. Ernesto Beckford of the WCB.

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Based on discussions during the meeting, the attached memorandum dated April 19, 2011, "inContact, Inc.'s Application for Review of WCB Decision" was emailed to Ms. Griffin and Ms. Veach (no e-mail address has been posted for Mr. Beckford). Neither the OGC staff nor Mr. Beckford are known to be decision-making personnel in connection with the Application. The purpose of the meeting was to obtain advice as to how to resolve the pending filings and the legal issues they raise.

Should you have any questions in this matter, kindly contact Mr. Helein.

/s/ Jacqueline R. Hankins

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MEMORANDUM

TO:

FROM: Charles H. Helein
Helein & Marashlian, LLC

DATE: March 21, 2011

RE: Order of the Telecommunications Access Policy Division
Wireline Competition Bureau

In the Matter of
Universal Service Contribution Methodology
Request for Review by inContact, Inc. of a
Decision by Universal Service Administrator

WC Docket No. 06-122

**Briefing outline to prepare for ex parte meeting to discuss inContact's pending request
for relief from USAC's 2009 true-up adjustment related to 2003 revenues**

Policy Considerations

Need for certainty. Universal service contributors need certainty about their universal service payment obligations. The annual true-up process¹ is a methodology that is proximate in time to the year revenues subject to assessment are earned making it possible to accurately assess contribution obligations under the market conditions existing at the time.

- To achieve the highest level of certainty, it is critical that both USAC and contributors need an effective, fair and balanced process for correcting mistakes during and after the annual true-up process concludes.
- Administrative and statutory limitations periods are necessary to achieve and maintain certainty and eliminate the present conditions under which USAC may at any time unilaterally determine that it has mistakenly under billed contribution assessments while

¹ With the true-up procedure, carriers "receive annual true-ups when they file their Forms 499-A in April of each year. "True-Up Report and Order, para. 19.

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refusing to acknowledge at any time after the one year grace period has expired that it overbilled.

- As shown below, the administrative limitations period applicable to the year in question (2003) is three years.
 - The federal default limitations period is four years.
 - But, without explanation, USAC made an additional true-up adjustment of nearly \$300,000 over 4 years after payment of contributions for 2003 was remitted, and one year after the record retention period had expired.
 - Beyond the direct financial impact, USAC's unilateral adjustment created a financial disclosure issue because the contributor is a publicly-traded company that reported that it had no outstanding USF contribution claims for this time period.
- Contributors and the WCB both require complete disclosure and support for true-up adjustments whenever made, but also when made after the payment due date has passed and particularly when made after the record retention period or the federal default limitations period has expired.
 - The FCC has instructed USAC not to send out corrective invoices without an explanation.
 - An invoice alone does not provide the Commission with the information to properly exercise its oversight of USAC.
 - An invoice alone does not provide the information a contributor needs to understand, much less dispute true-up adjustments.
 - USAC cannot be permitted to generate a true-up adjustment invoice and refuse to provide any information about the reason for the adjustment.
- The "pay and dispute" requirement applied to unexplained and, in particular, late issued adjustments is arbitrary and capricious. The "pay and dispute" rule unduly disadvantages contributors and gives USAC extortionate powers to run rough shod over contributors rights to due process.
- USAC's actions violate the statutory mandate of Section 254 that requires contributions to be competitively neutral and contribution mechanisms to be procedurally sound, clear and fair.
- USAC's actions frustrate the FCC's statement of policy and instructions governing the current annual true-up methodology. In the *True-Up Report and Order*, the Commission shortened the interval between the accrual of revenues and the assessment of universal service contributions so that universal service contributions could reflect current market conditions.

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The shortened interval will allow contributions to better reflect market trends influencing carriers' revenues, such as the entry of new providers into the interstate marketplace. As a result, the revised methodology will further the Commission's goal of maintaining competitive neutrality.²

Factual Background

- In 2004, inContact submitted its 499-A for 2003 revenues. In accordance with FCC methodology,³ USAC conducted an annual true-up, determining that inContact owed an additional \$1,054,238 which inContact paid in three monthly installments, the final installment being paid on October 15, 2004.
- On January 23, 2009, USAC issued an additional true-up adjustment on the 2003 revenues, billing inContact \$298,410.50 more in contributions. No explanation for the additional adjustment was provided, the extra amount simply appeared as a line item on the invoice.
- After receiving the invoice, inContact's Corporate Secretary contacted USAC seeking an explanation of the timing and items invoiced. (See Declaration of Kimm Partridge, attached). Ms. Partridge attests that USAC was asked for time to review the invoice a USAC staff member (not identified) agreed it could take 60 days or so to do so "before paying." The USAC staffer did forward an email with a link to the USAC website description of how true-ups are generally calculated and spreadsheets of calculations leading to the invoice, but no other explanation.
- When this invoice and other information was received, inContact no longer retained any records on 2003 revenues consistent with its records retention policies that adhered to the FCC's 3 year retention requirement for such records.

Procedural History

- inContact sought to resolve the billing dispute with USAC to no avail. inContact's efforts sought full payment history reports from USAC, extending over several months and involved its CFO and signatory to its 499 filings, as well as its legal and other representatives. But all such efforts were ignored by the USAC administrator.
- Denied any explanation for the nearly \$300,000 "adjustment" based on 2003 revenues inContact filed its Petition for Special Relief and Waiver on April 14, 2009 asking that the Wireline Competition Bureau (WCB) intervene.

² *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T, CC Docket No. 96-45, FCC 01-85, para. 9 (rel. Mar. 14, 2001) ("True-Up Report & Order").*

³ *Id.*

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- Concurrently, inContact filed an appeal with USAC. On July 31, 2009, USAC finally responded, but then only to advise that because the issue was pending before the FCC, it would "defer[]" to the FCC to decide the matter."
- The Commission placed inContact's petition on public notice on May 6, 2009, and on May 7, 2010, the WCB issued an order rejecting inContact's Petition for being late filed because it was not filed within 60 days of inContact's having received USAC's invoice containing the additional true-up adjustment.
- On June 7, 2010, inContact filed an Application for Review of the WCB's decision.
- The Application remains pending.

Legal Issues Presented

- Whether USAC's invoicing additional true-up adjustments without explanation or documentation is beyond the scope of its authority, arbitrary and capricious?
- Whether USAC's refusal to respond to information or provide any justification for additional true-up adjustments is beyond the scope of its authority, arbitrary and capricious?
- Whether USAC's invoicing in 2009 of additional true-up adjustments on 2003 revenues, the final contribution payment having been made in October 2004 is barred as a matter of law by applicable statutory and administrative limitation periods?
- Whether issuance of a USAC invoice without more is a "decision" that starts the 60 day period within which to file an appeal with the WCB?
- Whether the WCB decision dismissing inContact's Petition on May 7, 2010 is beyond the scope of its delegated authority, *ultra vires*, and arbitrary and capricious?
- Whether the actions and inactions of the WCB and USAC violate the Administrative Procedures Act?
- Whether the actions and inactions of the WCB and USAC denied inContact due process and are arbitrary and capricious?

Arguments

- USAC's claim for the additional true-up is barred as a matter of law by the four year Federal default statute of limitations. See attached April 2009 Petition for Special Relief and Waiver.

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USAC's claim for additional true-up on 2003 revenues is arbitrary and capricious and in violation of inContact's rights to due process because submitted after the expiration of the three records retention rule in effect at the time.

- Public policy mandates application of limitation periods.
 - Required to ensure compliance with Section 254's requirements for certainty, a specific and predictable contribution methodology, and ensuring that contributions are equitable and non-discriminatory.
 - Required to avoid competitive disadvantages and market distortions created by true-up adjustments remote in time to the year in which revenues are calculated and reported and contribution payments made.
 - Application of the pay and dispute policy despite violations of Section 254 mandates and applicable limitation periods is arbitrary and capricious and a violation of due process.
- Clarification of Process and Delegated Authority.
 - Obligation of WCB to act when USAC makes additional true-up adjustments without setting forth supporting facts and reasons.
 - Clarification that contributors have the right to invoke the authority of the WCB without first filing with USAC, particularly when USAC fails to act and provide support despite requests to do so.
 - Clarification that the issuance of a USAC invoice for additional true-up adjustments does not start the 60-day period for appeals to the Commission.
 - Clarification of Rule 54.719(c) that provides the right to seek FCC review of "actions" of the Administrator with Rule 54.720 that provides filing deadlines begin to run from the date of the "issuance of [a] decision."
 - Ruling that an "invoice" is not a USAC "decision."
 - In the True-Up Report and Order, para. 19 the Commission ruled: "The Commission delegates authority [to the WCB] under Section 54.711(c) to take whatever additional steps are necessary to implement the contribution methodology adopted herein." To the extent necessary, it should be clarified or simply reaffirmed that WCB's delegated authority to oversee the true-up adjustment process includes consideration of contributor challenges to unexplained and/or inexplicable adjustments and adjustments made remotely in time, especially those made after the expiration of the applicable limitations periods.

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Requested Relief

- Grant inContact's Application for Review, conducting a *de novo* review of the facts and legal arguments.
- Grant a waiver of the pay and dispute rule and associated rules during the pendency of Commission review and waive or hold inapplicable any interest charges, penalties, or a DCIA referral.
- The standards for granting a waiver are met:

Application of rules under the facts would be arbitrary and capricious, violate both statutory and constitutional requirements and statutory and administrative limitation periods.

Actions of USAC and WCB exceed their delegated authorities.

Equities solely favor inContact, including unjustified imposition of economic burden and interference with its financial affairs and reporting requirements, ignoring that inContact has (1) paid its true-up adjustment when timely rendered; (2) has no history of delinquency or untimely payment; and (3) promptly sought explanation from USAC and failing that sought relief from the WCB.

- Declare that USAC's true-up adjustment was untimely as a matter of law in violation of applicable limitation periods.
- Declare the pay and dispute rules are inapplicable to circumstances such as these.
- Require USAC to adhere to a policy and practice that is open, transparent and timely.
- Place the timing for making adjustments for both underpayments and overpayments on a level playing field – barring USAC from unilaterally assessing underpayment adjustments and refusing any consideration of overpayment adjustments.
- Declare that USAC must disclose the factual basis for any adjustments it seeks to impose consistent with its obligation to administer universal service support in "an efficient, effective, and competitively neutral manner." 47 C.F.R. § 54.701(a).

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MEMORANDUM

TO:

FROM: Charles H. Helein
Helein & Marashlian, LLC

DATE: March 21, 2011

RE: Order of the Telecommunications Access Policy Division
Wireline Competition Bureau

In the Matter of
Universal Service Contribution Methodology
Request for Review by inContact, Inc. of a
Decision by Universal Service Administrator

WC Docket No. 06-122

**inContact, Inc. Application for Review of Order of Wireline Competition Bureau Order,
DA 10-779, dated May 7, 2010**

For a substantial period of time, it appears that USAC's billing and collection practices have exceeded its delegated authority, FCC rules and applicable law. The practices complained of include:

- Ignoring when it makes mistakes in its practices and then unilaterally correcting them without reversing the adverse impact they cause to contributors.
- Imposing additional contribution assessments without cause or explanation.
- Making upward adjustments in assessments months and years after contributions are paid, including well after the record retention period has expired.
- Refusing to make any downward adjustments regardless of reason.
- Demanding that contributors pay regardless of evidence that such demands are contrary to fact and law.
- Refusing to consider any questions about the demand for the payment of additional assessments.
- Refusing to consider any questions about the demand for the payment of assessments that appear to be or are erroneous.

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Key Policy Issues

- Section 254(d) requires that universal service contributions be “equitable and non-discriminatory” and that the mechanisms established by the FCC be “specific” and “predictable.”
- FCC rules require USAC to administer universal service support in “an efficient, effective, and competitively neutral manner.” 47 C.F.R. § 54.701(a). To that end, the WCB has admonished USAC that when it makes adjustments to contributors’ obligations, it should provide an explanation prior to or at the time it issues an adjusted invoice.
- FCC policy set forth in orders requires the annual true-up process to be specific and predictable.
- The interval between the accrual of revenues and the assessment of contributions based on those revenues was shortened by FCC action, so that –
 - Contributions would be more in line with current market conditions.
 - Contributions would better reflect market trends that affect carriers’ revenues, such as the entry of new providers into the interstate marketplace.
 - The shortened interval would further competitive neutrality.

Key Legal Issues

- Whether USAC’s authority to correct errors in its invoices are subject to statutory and administrative periods of limitations?
- Whether the 60-day period for filing appeals of USAC decisions under Rule 54.720 commences with issue date of each invoice?

inContact Appeal - Factual Background

- In 2004 inContact made three timely payments to satisfy a true-up adjustment to its contributions based on 2003 revenue, the last payment being made on October 15, 2004.
- On January 23, 2009, inContact received an invoice from USAC for an additional true-up adjustment for nearly \$300,000. (“Additional Invoice”).
- When USAC was telephoned for an explanation, inContact was advised only to take some time to review the Additional Invoice “before paying it.”

Procedural Background

- USAC having failed to explain the basis for the Additional Invoice, on April 14, 2009, inContact filed a Petition for Special Relief and Waiver with the WCB (“WCB Petition”) and a Petition with USAC (“USAC Petition”).
- On July 31, 2009, USAC advised inContact in writing that because the issues were pending before the FCC, it would “defer[] to the FCC to decide the matter.”

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- On May 7, 2010, the WCB issued an order that inContact's WCB Petition was barred by the 60-day time period for filing appeals of billing and collection actions because it was filed more than 60 days after USAC had issued its Additional Invoice. ("May 7 Order").
- On June 7, 2010, inContact filed an Application for Review of the May 7 Order, seeking Commission review of the WCB's authority to apply the 60-day period of limitations from the date of Additional Invoice because *inter alia*, (1) the WCB lacked the authority to decide that the period of limitations ran from the date of the Additional Invoice; (2) there is no Commission decision, ruling or order that a USAC "invoice" is a "decision;" (3) USAC has no authority to decide inContact's challenge to the validity of the Additional Invoice by simply issuing an invoice; (4) USAC expressly deferred making any decision on the USAC Petition because the issues were before the FCC; and (5) USAC expressly represented that the Commission would make the decision.
- inContact's Application for Review of the May 7 Order remains pending before the Commission.
- It has been over a year since USAC issued the Additional Invoice.
- The Additional Invoice on January 23, 2009 was issued 4.3 years after the payment obligation on 2003 contributions became due.
- The Federal Default Statute of Limitations of 4 years is implicated here.

Requested Relief

- Conduct *de novo* review of inContact's request for relief and decide pending legal issues
 - USAC's second true-up correction was untimely as a matter of law; USAC is subject to statutory and administrative limitations periods:
 - Rule that the time period during which USAC may correct its own mistakes is limited by statute and regulations to, at the most, four years (based on the federal default statute of limitations) or three years (the record retention requirement applicable for 2003 revenues).
 - Instruct USAC that it must provide explanations to contributors for any adjustments made within the limitations period but outside the specific and expected time period for the annual true-up period, i.e., April of each year for revenues accrued the year before.
 - inContact's petition for relief was timely filed
 - Rule that a contributor's time period to appeal USAC "decisions" concerning billing and collection does not begin to run from the date theta USAC issues an invoice; the WCB's pronouncement that contributors' rights to seek

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intervention from the Commission regularly expire every two months after USAC issues its invoices is invalid and ultra vires.

- Declare and affirm that parties need not exhaust remedies before coming to the Commission for relief; parties have a right to appeal actions of divisions and committees directly to the Commission without waiting for USAC to issue a decision. USAC's inaction – its failure to offer an explanation in a written decision – cannot act as a bar to contributors seeking direct relief from the Commission
 - Find that, in this case, the 60-day time period for filing appeals began to run after USAC issued its decision in July 2009, when the matter was already before the FCC, and therefore the request for relief was timely filed.
- Grant inContact the relief requested
 - Waive the pay-and-dispute requirement.
 - Require USAC to remove the adjustment and any interest and penalties from the account.
 - Direct USAC to credit back the more than \$77,000 in SLD distributions that were offset by USAC against the disputed backbill amount, done with USAC's full knowledge that inContact filed an Appeal with the FCC.

MEMORANDUM

TO: Diane Griffin
Office of General Counsel
Federal Communications Commission

FROM: Charles H. Helein
Helein & Marashlian, LLC

DATE: April 4, 2011

RE: Order of the Telecommunications Access Policy Division
Wireline Competition Bureau *In the Matter of Universal Service Contribution
Methodology Request for Review by inContact, Inc. of a Decision by
Universal Service Administrator*

WC Docket No. 06-122

Introduction

The purpose of this memorandum is to outline the legal issues it is argued are raised by the actions of USAC and the Wireline Competition Bureau's Order in response to the appeal of those actions taken by inContact, Inc. referenced above.

The legal issues specific to inContact in general are:

Whether the billing and collection practices of USAC applied to inContact which were appealed to the Bureau exceeded its delegated authority, FCC rules and applicable law?

Whether the Bureau's Order in response to inContact's appeal of USAC's actions is beyond the scope of its delegated authority, *ultra vires*, and arbitrary and capricious.

Factual Background

- In 2004, inContact submitted its 499-A for 2003 revenues. In accordance with FCC methodology,¹ USAC conducted an annual true-up, determining that inContact owed an

¹ *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T, CC* Docket No. 96-45, FCC 01-85, para. 9 (rel. Mar. 14, 2001) ("True-Up Report & Order").

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additional \$1,054,238 which inContact paid in three monthly installments, the final installment being paid on October 15, 2004.

- On January 23, 2009, USAC issued an additional true-up adjustment on the 2003 revenues, billing inContact \$298,410.50 more in contributions. No explanation for the additional adjustment was provided; the extra amount simply appeared as a line item on the invoice.
- After receiving the invoice, inContact's Corporate Secretary, Kimm Partridge, contacted USAC seeking an explanation of the timing and items invoiced. Ms. Partridge has attested that USAC was telephoned and asked for time to review the invoice and a USAC staff member (not identified) agreed it could take 60 days or so to do so "before paying." The USAC staffer did forward an email with a link to the USAC website description of how true-ups are generally calculated and spreadsheets of calculations leading to the invoice, but no other explanation.
- However, consistent with its records retention policies that were based on and in compliance with the FCC's 3 year retention requirement for such records, when the invoice was received, inContact no longer had records on 2003 revenues.

Procedural History

- After receiving the invoice, inContact sought to resolve the billing dispute with USAC. For several months, inContact's CFO and signatory to its 499 filings, as well as its legal and other representatives sought full payment history reports from USAC. These efforts produced no response from USAC.
- Denied any explanation for the \$298,410.50 "adjustment" based on 2003 revenues, on April 14, 2009, inContact filed a Petition for Special Relief and Waiver asking that the Wireline Competition Bureau (WCB) intervene.
- Concurrently, inContact filed an appeal with USAC. USAC did not respond to this appeal until July 31, 2009, but only advised that because the issue was pending before the FCC, it would "defer[] to the FCC to decide the matter."
- The Commission placed inContact's petition on public notice on May 6, 2009. On May 7, 2010, the WCB issued its Order rejecting inContact's Petition for being late filed. The basis of this finding was that the Petition had not been filed within 60 days of inContact's having received USAC's invoice containing the additional true-up adjustment.

- On June 7, 2010, inContact filed an Application for Review of the May 7 Order, seeking Commission review of the WCB's authority to apply the 60-day period of limitations from the date of Additional Invoice because *inter alia*, (1) the WCB lacked the authority to decide that the period of limitations ran from the date of the Additional Invoice; (2) there is no Commission decision, ruling or order that a USAC "invoice" is a "decision;" (3) USAC has no authority to decide inContact's challenge to the validity of the Additional Invoice by simply issuing an invoice; (4) USAC expressly deferred making any decision on the USAC Petition because the issues were before the FCC; and (5) USAC expressly represented that the Commission would make the decision.
- inContact's Application for Review of the May 7 Order remains pending before the Commission.

Legal Issues Presented

- Whether USAC's invoicing additional true-up adjustments without explanation or documentation is beyond the scope of its authority, arbitrary and capricious?
- Whether USAC's refusal to respond to information or provide any justification for additional true-up adjustments is beyond the scope of its authority, arbitrary and capricious?
- Whether USAC's invoicing in 2009 of additional true-up adjustments on 2003 revenues, the final contribution payment having been made in October 2004 is barred as a matter of law by applicable statutory and administrative limitation periods?
- Whether USAC's authority to correct errors in its invoices are subject to statutory and administrative periods of limitations?
- Whether the 60-day period for filing appeals of USAC decisions under Rule 54.720 commences with the "issue date" of each invoice?
- Whether issuance of a USAC invoice without more is a "decision" that starts the 60 day period within which to file an appeal with the WCB?
- Whether the WCB decision dismissing inContact's Petition on May 7, 2010 is beyond the scope of its delegated authority, *ultra vires*, and arbitrary and capricious?
- Whether the actions and inactions of the WCB and USAC violate the Administrative Procedures Act?

- Whether the actions and inactions of the WCB and USAC denied inContact due process and are arbitrary and capricious?
- Whether the following USAC practices are unlawful, arbitrary and capricious –
 - USAC's ignoring when it makes mistakes in its practices and then unilaterally correcting them without reversing the adverse impact they cause to contributors.
 - Making upward adjustments in assessments months and years after contributions are paid, including well after the record retention period has expired.
 - Refusing to make any downward adjustments regardless of reason.
 - Demanding that contributors pay regardless of evidence that such demands are contrary to fact and law.
 - Failing to respond to questions about the demand for the payment of additional assessments.
 - Failing to respond to questions about the demand for the payment of assessments that appear to be or are erroneous.
- Whether USAC practices violate Section 254(d)'s requirement that universal service contributions be "equitable and non-discriminatory" and that the mechanisms established by the FCC be "specific" and "predictable."?
- Whether USAC practices violate the FCC rules that require USAC to administer universal service support in "an efficient, effective, and competitively neutral manner." 47 C.F.R. § 54.701(a) and are contrary to the WCB's directive that when it makes adjustments to contributors' obligations, USAC provide an explanation prior to or at the time it issues an adjusted invoice.
- Whether the Additional Invoice issued on January 23, 2009, 4.3 years after the payment obligation on 2003 contributions became due is barred by the Federal Default Statute of Limitations of 4 years?

Requested Relief

- Grant inContact's Application for Review conducting *de novo* review of inContact's request for relief and decide all legal issues including that -
 - USAC's second true-up correction was untimely as a matter of law.
 - USAC is subject to statutory and administrative limitations periods by ruling that the time period during which USAC may correct its own mistakes is limited by statute and regulations to, at the most, four years (based on the federal default statute of

limitations) or three years (the record retention requirement applicable for 2003 revenues).

- Rule that USAC must provide explanations to contributors for any adjustments made within the limitations period but outside the specific and expected time period for the annual true-up period, i.e., April of each year for revenues accrued the year before.
- Rule that inContact's petition for relief was timely filed because a contributor's time period to appeal USAC "decisions" concerning billing and collection does not begin to run from the date USAC issues an invoice.
- Rule that WCB's holding that contributors' rights to seek intervention from the Commission expire two months after USAC issues its invoices is invalid and ultra vires.
- Declare and affirm that parties need not exhaust remedies before coming to the Commission for relief; parties have a right to appeal directly to the Commission without waiting for USAC to issue a decision.
- USAC's failure to offer an explanation in a written decision cannot act as a bar to contributors seeking direct relief from the Commission.
- Find that, in this case, the 60-day time period for filing appeals began to run after USAC issued its decision in July 2009, when the matter was already before the FCC, and therefore the request for relief was timely filed.
- Waive the pay-and-dispute requirement.
- Require USAC to remove the adjustment and any interest and penalties from the account.
- Direct USAC to credit back the more than \$77,000 in SLD distributions that were offset by USAC against the disputed back bill amount, done with USAC's full knowledge that inContact filed an Appeal with the FCC.

END

MEMORANDUM

TO: Diane Holland Griffin
Julie Veach
Ernesto Beckford

FROM: Charles H. Helein
Jacqueline R. Hankins

DATE: April 19, 2011

RE: inContact, Inc.'s Application for Review of WCB Decision

Dear Ms. Griffin, Ms. Veach and Mr. Beckford:

On behalf of inContact, Inc. ("inContact"), the following memorandum supplements our firm's memorandum provided to the Office of General Counsel ("OGC") on April 4, 2011. Specifically, during discussions with OGC staff on April 15, 2011, issues were raised regarding the legislative history of the Federal Communications Commission's ("FCC" or "Commission") rules relating to appeals of Universal Service Administrative Company ("USAC") "decisions." A review of the rules revealed that, while Section 54.719 refers to appeals of any "action" taken by USAC, Section 54.720 discusses "decisions" adopted by USAC.¹

In its pending Request for Review of a Decision of the Wireline Competition Bureau ("WCB" or "Bureau"), inContact disputes the Bureau's interpretation of the term "decision" in Section 54.720(a) to refer to a mere USAC invoice.² The following summarizes our research supporting this analysis.

First, we reviewed the Commission's orders adopting and revising CFR Sections 54.719 and 54.720, as well as the Federal Register issues publishing the rules.³ These publications failed to

¹ 47 C.F.R. § 54.719; 47 C.F.R. § 54.720.

² See *In the Matter of Universal Service Contribution Methodology Request for Review by inContact, Inc. of a Decision by Universal Service Administrator*, WC Docket No. 06-122, Order, DA 10-779 (rel. May 7, 2010); See also *In the Matter of Form 499 Filer ID 818114 Petition for Special Relief and Waiver*, Application for Review of Order of Wireline Competition Bureau, 07-779, May 7, 2010, WC Docket No. 06-122 (filed June 7, 2010).

³ See, e.g., 63 FR 70577 (Dec. 21, 1998); 68 FR 36943 (June 20, 2003); *In the Matters of Federal-State Joint Board on Universal Service, Changes to Board of Directors of the National Carrier Exchange Association, Inc.*, CC Docket Nos. 96-45 & 97-21, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, FCC 98-306, 13 FCC Rcd 25058 (1998) ("1998 Order"); *In*

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provide any guidance on the meaning of the terms "action" under Section 54.719 and "decision" under Section 54.720. However, the FCC repeatedly uses the term "decision" rather than "action" when referring to the appeals process under Sections 54.719 and 54.720.⁴ Further, Section 54.721 specifically instructs parties seeking review of a USAC matter to caption the proceeding, "In the Matter of Request for Review (by name of party seeking review) of **Decision** of Universal Service Administrator."⁵

In addition to reviewing the legislative history of Sections 54.719 and 54.720, we reviewed relevant Commission orders. We found no guidance issued by the Commission interpreting the term "decision."⁶ However, the Commission or its bureaus have on multiple occasions issued orders responding to requests for review of USAC decisions. In these instances, the USAC "decisions" at issue involved substantive writings that outlined the material facts at issue (i.e. letters or audit opinions).⁷ For example, the Commission issued an order in response to TelePacific Corp.'s and InterCall, Inc.'s appeals of USAC audit decision letters.⁸

the Matters of Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order, 17 FCC Rcd 339 (Com. Car. Bur. 2001), as corrected by *Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata (Com. Car. Bur. rel. Dec. 28, 2001 and Jan. 4, 2002) (modifying the 30-day deadline for filing an appeal of a decision made by USAC) ("2001 Interim Order"); *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 03-101, 18 FCC Rcd 9202 (2003); *In the Matters of Implementation of Interim Filing Procedures for Filings of Requests for Review, Request Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, FCC 02-339, 18 FCC Rcd 490 (2003).

⁴ See, e.g., 1998 Order at ¶ 64 (referring only once to the right to appeal an "action" taken by USAC, while referring repeatedly to the right to appeal a USAC "decision"). See *id.* at ¶ 64 ("An affected party would be permitted to file a petition for Commission review with the Bureau within sixty (60) days of an action taken by USAC."), but see *id.* at ¶ 64 (addressing the right to "appeal USAC decisions to the Commission"); see also *id.* at ¶¶ 65-75 (repeatedly referring to the right to appeal a USAC "decision"); See also 2001 Interim Order at ¶ 2 (using the term "decision" when referring to a party's rights under both Sections 54.719 and 54.720).

⁵ 47 C.F.R. § 54.721 (emphasis added).

⁶ Notably, we found no reference to an "invoice" as a decision.

⁷ See, e.g., *In the Matter of Universal Service Contribution Methodology Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications*, WC Docket No. 06-122, Order, DA 10-752 (rel. April 30, 2010) ("TelePacific Order") (Commission decision on TelePacific request for review of contributor audit decision); See *id.* at 5, n. 31 (referring to the date of issuance of the USAC decision letter as the date of the "decision" for purposes of appeal) (emphasis added) ("USAC allows contributors 60 days to comply with its decisions before assessing penalties; the February 8, 2010 deadline is 60 days from the date of USAC's December 10, 2009 decision letter to TelePacific. See USAC Decision Letter at 6."); See *In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, FCC 08-160, 23 FCC Rcd 10731 (2008) at 3 ("InterCall Order") ("On January 15, 2008, USAC issued a decision finding, among other things, that the audio bridging service provided by InterCall are toll teleconferencing services, and are,

Specific appeals of USAC decisions also lend some support to inContact's interpretation of the term "decision" as one which requires consideration of issues and does not include a mere standard invoice. For example, in its request for review, TelePacific appealed an audit decision, issued by USAC in letter form.⁹ Similarly, AT&T petitioned for review of a USAC audit decision, consisting of a full audit report and accompanying letter.¹⁰ In addition, on the service provider side, GCI Communication Corp. sought review of a USAC decision in the form of a series of USAC-issued "funding Commitment Letters that refused reimbursement for the costs of the transparent LAN services that GCI actually provisioned."¹¹

We believe the Commission and its bureaus' practices clearly favor inContact's interpretation. However, if necessary to do so to resolve any uncertainty, referral to the plain meaning of the terms as established by their standard dictionary definitions may be made.

Decision: the act or process of deciding; a determination arrived at after consideration; a report of a conclusion.¹²

Action: the initiating of a proceeding in a court of justice by which one demands or enforces one's right; *also*: the proceeding itself; the bringing about of an alteration by force or through a natural agency; the manner or method of performing: *a*: an actor's or speaker's deportment or expression by means of attitude, voice, and gesture *b*: the style of movement of the feet and legs (as of a horse) *c*: a function of the body or one of its parts; an act of will; a thing done.¹³

therefore, subject to direct USF contribution obligations" where the "decision" meant an audit letter (See Letter from USAC to Steven A. Augustino, Esq., Kelley, Drye and Warren LLP, at 1 (dated Jan. 15, 2008) (InterCall USAC Decision)); *see also In the Matter of Request for Review of a Decision of the Universal Service Administrator by Warren Village School Warren, New Hampshire Schools and Libraries Universal Service Support Mechanism*, Order, DA 11-59 (Jan. 13, 2011) (granting request for review of USAC decision in the form of "a funding commitment decision letter (FCDL) from USAC"); *In the Matter of Request for Review of the Decision of the Universal Service Administrative Company by Nassau County Board of Cooperative Educational Services Westbury, New York, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-139083, CC Docket Nos. 96-45 & 97-21, Order, DA 02-3365 (Dec. 6, 2002) (reversing USAC decision issued by letter).

⁸ See TelePacific Order and InterCall Order.

⁹ See *In the Matter of Request for Review by U.S. TelePacific Corp. d/b/a TelePacific Communications of Universal Service Administrator Decision*, Request for Review, WC Docket No. 06-122 (Jan. 8, 2010) at 1; *see also id.* at Exhibit A.

¹⁰ *In the Matter of Request for Review by AT&T Inc. of Decision of Universal Service Administrator*, WC Docket No. 03-109, Request for Review (Feb. 1, 2010) at 1, n. 3; *see also id.* at Appendix A.

¹¹ *In the Matter of Request for Review of GCI Communication Corp. of Decision by Universal Service Administrator, et. al.*, Request for Review, WCB Docket 02-60 (Aug. 23, 2010) at 5; *See also In the Matter of Request for Review of Decision of the Universal Service Administrator, et. al.*, Request for Review, CC Docket Nos. 96-45 and 97-21 (Nov. 4, 2002).

¹² See <http://www.merriam-webster.com/dictionary/decision> (emphasis added).

¹³ See <http://www.merriam-webster.com/dictionary/action>.

More to the point, the Administrative Procedure Act contains the following definition of a decision.

All decisions ... shall include a statement of - (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.¹⁴

Equating the "action" of issuing a belated invoice without explanation to a "decision" is bootstrapping that the Commission cannot defend. Such a result is arbitrary and capricious and a denial of due process.

Based upon the foregoing, a remand to USAC is not justified. Specifically, because USAC's claim is barred by the Federal default statute of limitations, and prejudice to inContact would result from the lack of any records relating to its 2003 subject revenues, a remand to USAC to consider the issues would not provide inContact with the full relief it requires- absolution of the USAC debt.

In final response to the question of what relief is sought, inContact is seeking the remedies set forth in its Petition and Application for Review. Specifically, the Commission must review the WCB's Order *de novo* and find it invalid and of no effect. The FCC must then consider the merits of inContact's Petition, and ultimately conclude that as a matter of law, the USAC debt has been extinguished.

inContact respectfully requests that the Office of General Counsel recommend to the Commission that it promptly address and decide the pending Petition and Application for Review.

Should you have any questions, kindly contact the undersigned.

s/ Charles H. Helein

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¹⁴ 5 U.S.C. § 557.